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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 997

LENINE STROLLO, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No.

LENINE STROLLO, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Ohio, Eastern Division.

Opinions Below

The Court of Appeals rendered no opinion. Its judgment is set forth in the Appendix at pp. 28-29. The District Court's unreported opinion denying a severance is set forth in the Appendix at pp. 21-24.

Jurisdiction

The judgment of the Court of Appeals was entered on November 2, 1964. A petition for rehearing was denied on January 21, 1965. By order of Mr. Justice Stewart, the time for the petitioner to file his petition was extended to March 22, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether it is proper to join with conspiracy charges an unconnected count involving petitioner and a defendant who was disassociated from the conspiracy. Whether the joinder of conspiracy defendants with petitioner, a conspiracy defendant, and Zappia, a defendant not involved in the conspiracy is authorized by Rule 8(b) of the Federal Rules of Criminal Procedure where the conspiracy involved passing of counterfeit notes as genuine and the count against petitioner and Zappia related to an unconnected attempted sale of counterfeit notes and not an attempt to pass them as genuine. Is such joinder prejudicial and contrary to *McElroy* v. *United States*, 164 U.S. 76 (1896); *Schaffer* v. *United States*, 362 U.S. 511 (1959); *Ingram* v. *United States*, 272 F. 2d 567 (4th Cir., 1959); and *Ward* v. *United States*, 289 F. 2d 877 (D.C. Cir., 1961)?

2. Whether a conviction for an attempted sale of counterfeit notes should be sustained where the trial court charged the jury that: "Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design would constitute an attempt."

3. Whether the Government's evidence established a criminal attempt in Ohio where it showed preparations made in Ohio to have further discussions in New York on February 4, 1963 to consummate the purchase of counterfeit notes and where no price or quantity of notes to be sold had been determined.

4. Whether there is a violation of 18 U.S.C. 472 and intent to defraud thereunder when an attempted sale is made of false obligations with full disclosure that they are counterfeit.

5. Whether a conviction for an attempted sale of counterfeit notes all bearing serial number C 68185774A may be sustained where the evidence merely disclosed that a single note so numbered had been transferred as a sample and negotiations had not been concluded as to price, quantity or the serial numbers of the notes to be sold. Was petitioner convicted of an attempted sale of counterfeit notes without any evidence of guilt under prejudicially erroneous instructions and in violation of due process?

6. Whether illegal multiple punishment has been imposed by three separate consecutive sentences upon an indictment charging a conspiracy to pass counterfeit notes and the possession and passing of such counterfeit notes as alleged in the conspiracy?

7. Whether a defendant may be convicted and sentenced for conspiracy to pass counterfeit notes and also for the aiding and abetting the passing of such counterfeit notes.

Statutes and Rules Involved

Section 371 of 18 U.S.C. provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commision of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed

the maximum punishment provided for such misdemeanor."

Section 472 of 18 U.S.C. provides:

"Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

"Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all the defendants need not be charged in each count."

Statement

Petitioner was indicted with three co-defendants, Vincent Serman, Robert Armstrong and John Paul Paladinich for conspiracy to defraud, and with passing counterfeit Federal Reserve notes as genuine, contrary to 18 U.S.C. 371, 472, and 473 (Count I, App. p. 17). Overt acts alleged the possession of counterfeit notes on January 2, 1963, and the passing of a counterfeit note on January 4, 1963, by defendant, Paladinich. Counts II and III alleged these overt acts as substantive crimes but specified the

possession and passing of a counterfeit note bearing number E 15258600 C. Armstrong pleaded guilty to Count I (Tr. 1068). Paladinich pleaded guilty to the first three counts (Tr. 1068).

At the trial, defendant, John Paladinich, testified in support of the conspiracy charge and the charges in Counts II and III. He was the Government's principal witness and asserted that plans for the conspiracy were formulated at petitioner's home on January 3, 1963, at 11:00 p.m., where he was shown $60,000 in counterfeit notes (Tr. 9-13). The testimony of a brother, Joseph Paladinich, only implicated defendant Serman in the conspiracy (Tr. 151-213). Defendant Armstrong, although pleading guilty to Count I, denied that petitioner or Serman were in anyway involved in any illegal activity. He asserted that he had possessed $60,000 in counterfeit notes and that he had passed some of them, together with defendant, John Paladinich, and that he later burned $40,000 of the notes. He specifically disclaimed receiving any of the counterfeit notes from petitioner or Serman (Tr. 711, 759, 829, 850). Petitioner and Serman testified in their own defense, denying all charges (Tr. 459-586, 879-993). Serman, a member in good standing of the Ohio Bar, contended he was the object of John Paladinich's revenge, that he had acted as attorney for Paladinich's brother upon his arrest on January 5, 1963, and that he had never engaged in any conspiracy to pass counterfeit notes (Tr. 890-922). Several witnesses corroborated petitioner's claim that he was at home on the evening of January 3, 1963, at a small social gathering and that John Paladinich was not present (Tr. 484-6, 692, 696). Petitioner and Serman were found guilty as charged in the first three counts of the indictment and petitioner was sentenced consecutively to three years on each of these three counts (App. 26).

Petitioner was also charged with another co-defendant, Nick Zappia, with the sale and attempted sale of Federal Reserve notes bearing Serial number C 68185774 A to Secret Service Agent Vecchione on January 31, 1963 (Count V) and passing a counterfeit note as genuine bearing such identical serial number (Count VI).

Co-defendant Nick Zappia was only indicted in Counts V and VI. Petitioner moved for a separate trial of the issues raised by Counts V and VI (App. p. 21). The District Court denied the motion upon the authority of *United States* v. *Welsh*, 15 F.R.D. 189 (D.C. Dist of Col., 1953), observing that the acts charged were within the period of the conspiracy alleged in Count I and that if the evidence failed to substantiate the relationship of these counts with others, the petitioner would be entitled to appropriate relief at the time of trial (App. p. 24). At the close of the Government's case, at the close of all the vidence, and in a motion for a new trial, the motion to sever was unsuccessfully renewed (Tr. 442, 1060, R. 25a). Count VI was dismissed at the close of the Government's case and a verdict of acquittal granted upon the ground that the evidence failed to show an intent to pass Government Exhibit 27, a counterfeit note numbered C 68185774 A as genuine (Tr. 458).

Defendant Zappia testified in his own behalf and denied any intent to sell counterfeit notes (Tr. 641). However, Zappia was a convicted felon on parole (Tr. 620, 672) and the District Court charged the jury that his felony could be utilized to discredit him (Tr. 1103). Count V charged a sale and an attempted sale of counterfeit notes numbered C 68185774 A to Secret Service Agent Vecchione on January 31, 1963, in Youngstown, Ohio.

Agent Vecchione testified that on January 31, 1963, he met Zappia and petitioner, through an informer, that the petitioner displayed a $10.00 counterfeit note to him at

Lenny's Lounge in Ohio. that subsequently on that night a single counterfeit note number C 68185774 A (Govt. Ex. 27) was given to him as a sample by Zappia who was to call the agent in New York City on February 3, 1963, to discuss the deal that could be made for the sale of other counterfeit notes (Tr. 326). The price of the sale had not been arranged nor the quantity of notes to be delivered. Moreover, the sale was not to take place in Ohio. Agent Vecchione stated (Tr. 397):

> "* * * Mr. Strollo and Zappia were to bring the counterfeit money part way to New York. I was to make the arrangements in New York with my man, meet and consummate the transaction."

The District Judge at first advised the jury that petitioner might be found guilty of a sale or attempted sale of Federal Reserve notes numbered C 68185774 A (Tr. 1090), but later charged the jury that there was no sale and confined Count V to an attempted sale of a single Federal Reserve note numbered C 68185774 A. (Govt. Ex. 27, Tr. 1113). After informing the jury that an attempt required an act which reached "far enough toward the accomplishment of the desired result to amount to the commencement of the consummation" (Tr. 1092), the District Court concluded:

> "Whether the design of a person to commit a crime is clearly shown, slight acts done in the futherance of that design would constitute an attempt." (Tr. 1092-3)

Petitioner was found guilty of an attempt as charged in Count V and sentenced thereon to five years probation to follow his sentences on the first three counts of the indictment (App. 26).

The case was submitted to the jury on July 22, 1963, at about noon (Tr. 1115) and further instructions were re-

quested by the foreman as to the necessity of finding both a sale and an attempted sale as charged in Count V (Tr. 1116). The jury's deliberations were subsequently adjourned until the following day when requests were made for information as to the day and time Joseph Paladinich gave his written testimony to Federal officers and testimony as to when Joseph and John Paladinich met defendant Serman at a railroad station on January 4, 1963 (Tr. 1131). The District Court advised the jury that Joseph Paladinich made his written confession on January 5th, 1963, although the Court's Exhibit C clearly shows that it was made thereafter on January 21, or February 21, 1963 (Tr. 1124).[1] The jury deliberated until 4:30 p.m. on July 23, 1963, before reaching the verdict (Tr. 1132-33). After the verdict petitioner renewed his request for acquittal on all counts in a motion to set aside the verdict (R. 25a). Petitioner was sentenced to three years consecutively on each of the first three counts and to five years' probation on Count V. His appeal to the Circuit Court of Appeals resulted in a judgment of affirmance.

Reasons for Granting Writ of Certiorari

The conviction of petitioner is the product of prejudicial misjoinder of defendants contrary to principles approved by this Court and in conflict with decisions of several circuits. The affirmance of petitioner's conviction below raises issues of recurring importance in the administration of criminal justice relating to misjoinder of defendants, the standards to be applied in defining criminal attempts, the construction of the federal counterfeiting statute, and in the area of multiple punishment for the same offense.

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[1] Whether this instruction to the jury constitutes prejudicial error will be more fully developed in the petition for certiorari to be filed by co-defendant Vincent Serman. Petitioner relies upon the discussion of this issue set forth therein.

1. The joinder of Count V herein and the joinder of defendant Nick Zappia who took no part in the conspiracy to pass counterfeit notes was contrary to decisions of this Court and other circuits. *McElroy* v. *United States*, 164 U.S. 76, 81 (1896), forbids "the joinder of distinct felonies not provable by the same evidence and in no sense resulting from the same series of acts." See also *Schaffer* v. *United States*, 362 U.S. 511 (1959). *Ward* v. *United States*, 289 F. 2d 877, 878 (D.C. Cir., 1961), involved narcotic charges which did not grow out of a common conspiracy. Defendant Ward was tried on separate narcotic counts, some charging him alone and some charging him in association with another defendant.

The Court declared:

> "Where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact and the trial judge has no discretion to deny relief."

Ingram v. *United States*, 272 F. 2d 567, 570 (4th Cir., 1959), presented joinder of Ingram with different defendants in each of two separate transactions for possession and concealment of liquor upon which a tax had not been paid. The joinder was considered prejudicial with the observation that:

> "The rule against jointly indicting and trying different defendants for unconnected offenses is a long established procedural safeguard."

The dangers of unfairness in criminal conspiracy charges which permit utilization of hearsay evidence have been the subject of widespread criticism from the judiciary and law review commentators. *Developments in the Law-Criminal Conspiracy*, 72 Harvard Law Review 920 (1959). "Prosecutions for conspiracy present difficulties and temp-

tations familiar to anyone with experience as a federal prosecutor", Mr. Justice Frankfurter, *Delli Paoli* v. *United States*, 352 U.S. 232, 246 (1956). This had led some courts to require election between a conspiracy charge and related substantive counts, *United States* v. *Solomon*, 26 F.R.D. 397 (1960). Here, we are concerned with the joinder of a conspiracy count with an unconnected substantive charge and a defendant not involved in the conspiracy.

The conspiracy herein pertained to the passing of counterfeit notes as genuine. Count V charged the attempted sale of bogus notes as counterfeit obligations—an offense not involved in the conspiracy. The evidence supporting Count V was not provable by the same evidence. Defendant Nick Zappia was neither charged nor proven to be a co-conspirator. He and petitioner were convicted under Count V of a January 31, 1963, attempt to sell counterfeit notes to Secret Service Agent Vecchione in Youngstown, Ohio (App. 20, 26). The indictment does not allege that this was connected in any way with the conspiracy to pass counterfeit notes charged against petitioner and the others named in Count I. The trial produced not a shred of evidence to connect these two counts. Count V was not connected with any other counts in the indictment. The District Court acknowledged, in denying a pretrial motion for severance that (App. 24):

> "If at the trial the evidence fails to substantiate the relationship, which the Court believes the indictment indicates, between the acts charged in Counts V and VI and the remaining counts, then the defendants will be entitled to appropriate relief at that time."

The Government argued below that the acts set forth occurred during the period of the conspiracy and that the denial of severance herein was a discretionary matter.

However, there was no proof connecting Count V with the conspiracy. Defendant Zappia was not charged as a co-conspirator although he was the prime negotiator in the events described in Count V. The view that severance here is a matter of discretion conflicts with decisions of this Court and other circuits. Under the cases cited above the prejudicial effect of joinder in violation of Rule 8b is conclusively presumed. Here it is highlighted by the fact that Count V was a matter of first concern to the jury, as revealed by its initial request for additional instructions (Tr. 1116). Count V was supported by direct evidence of a Secret Service Agent. Other counts relied upon accomplice testimony—always viewed with suspicion. The remaining counts also produced a sharp conflict in the testimony. Finally, as we urge later, the evidence supporting Count V did not warrant submission of such count to the jury.

Count V, accordingly, may have presented the difference between acquittal and guilt on all charges herein. The erroneous joinder herein, in conflict with decisions of this Court and other circuits, warrants Supreme Court review.

2. The scope of attempts in our criminal jurisprudence presents "one of the most difficult problems of the criminal law." Prof. Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 University of Pennsylvania Law Review 464 (1954). Criminal attempts have not been authoritatively defined by this Court. In view of the importance and recurring difficulty of the problem presented, this subject merits review by certiorari.

At common law, an act amounted to a criminal attempt when it was so near completion that the danger of sucess was very great. Halsbury in his *Laws of England* (Vol. 10, 3rd Ed., p. 308), states:

> "An act, in order to be a criminal attempt, must be immediately, and not remotely connected with and directly tending to the commission of an offense."

Mr. Justice Holmes in *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272 (1901), refers to acts constituting an attempt as coming very near to the accomplishment of the crime. See also: *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1904); *People* v. *Rizzo*, 246 N.Y. 334 (1927); *United States* v. *Coplon*, 185 F. 2d 629, 633 (2nd Cir., 1950); and *Beale, Criminal Attempts*, 16 Harvard Law Review, 491, 501 (1903).

Viewed in the light most favorable to the Government, the evidence supporting Count V utterly failed to show any intent to defraud Agent Vecchione or any intent to pass bogus notes as genuine as required by 18 U.S.C. 472. Vecchione sought to purchase counterfeit notes and no attempt was made to sell such notes to him as genuine obligations. Count VI based upon such an alleged fraudulent transfer resulted in a directed verdict of acquittal (Tr. 458). Admittedly, there was no evidence of intent to pass or sell counterfeit notes as genuine. The requisite intent to defraud was likewise lacking for Count V. *Riggs* v. *United States*, 280 F. 2d 750, 752 (5th Cir., 1960).

Moreover, the evidence utterly failed to show a criminal attempt. The conduct of Zappia and petitioner in Ohio on January 31, 1963, was far from the accomplishment of the crime of selling counterfeit notes four days later in New York. Petitioner has been convicted in violation of due process without evidence of guilt. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

Under Count V, petitioner and Nick Zappia were convicted of an attempt to sell on January 31, 1963, in Ohio, counterfeit notes numbered C 68185774 A to Secret Service

Agent Vecchione. On January 31, 1963, in Ohio, defendant Zappia gave Agent Vecchione a single counterfeit note numbered C 68185774 A (Govt. Ex. 27) as a sample. Zappia was to call the Agent in New York City on February 4, 1963, to discuss the deal that could be made for the sale of other counterfeit notes (Tr. 326). The price of the sale had not been aranged nor the quantity of notes to be delivered.

The sale was not to take place in Ohio. Agent Vecchione stated (Tr. 397):

> "* * * Mr. Strollo and Zappia were to bring the counterfeit money part way to New York. I was to make the arrangements in New York with my man, meet and consummate the transaction."

The District Judge at first advised the jury that petitioner might be found guilty of a sale or attempted sale of Federal Reserve notes numbered C 68185774 A (Tr. 1090), but later charged the jury that there was no sale and confined Count V to an attempted sale of a single Federal Reserve note numbered C 68185774 A (Govt. Ex. 27, Tr. 1113). After informing the jury that an attempt required an act which reached "far enough toward the accomplishment of the desired result to amount to the commencement of the consummation" (Tr. 1092), the District Court concluded:

> "Whenever the design of a person to commit a crime is clearly shown, slight acts done in the furtherance of that design would constitute an attempt." (Tr. 1092)

Thereafter, the jury revealed its confusion resulting from this charge by requesting instructions whether it was necessary to find both a sale and attempted sale (Tr. 1116). Obviously, under the Court's charge, the jury convicted

petitioner of the attempted sale of a single counterfeit note (Ex. 27) which had not been sold but only transferred as a sample to Agent Vecchione.[2] Obviously, the jury was confused and misled as to the legal standards applicable to criminal attempts. Obviously, the jury convicted petitioner under a count charging intent to sell counterfeit notes numbered C 68185774 A when there was no evidence to show that petitioner possessed for sale a quantity of such notes so numbered. Obviously, the petitioner was convicted although he was very far from accomplishing the alleged sale. Moreover, consideration of this count was prejudiced by joinder with the conspiracy charge herein. Due process and this Court should not allow a conviction, the product of such confusion and erroneous legal standards, to stand.

3. Under the Fifth Amendment no one may be subjected to more than one punishment for the same offense. *Green* v. *United States*, 355 U.S. 184, 201-2 (1957). Petitioner has been sentenced for conspiracy to pass counterfeit notes (Count I), possession of a counterfeit note (Count II), and the passing of a counterfeit note (Count III).

(A) Counts II and III spring from a common scheme—the conspiracy. As they involved a course of conduct, separate punishments should not have been imposed therefor. *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952); *Bell* v. *United States*, 349 U.S. 81 (1954).

(B) Count III involved the passing of a counterfeit note by defendant Paladinich on January 4, 1963. Petitioner

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[2] It was plain error under Rule 52(b) of the Rules of Criminal Procedure to fail to instruct the jury as to every essential element of the crime charged in Count V. *United Brothers of Carpenters & Joiners* v. *United States*, 330 U.S. 395, 412 (1946). The crime charged in the indictment was not the same as the crime outlined for the jury in the instructions. The "jury should not be permitted to speculate on what crime is being submitted to them to resolve or what the contents of each crime might be." *Williamson* v. *United States*, 332 F. 2d 123, 133-4 (5th Cir., 1964). Here, the jury was not only left to speculate but was completely misled as to the nature of the crime submitted to it.

could only be a participant in this passing as an aider and abettor. The same evidence which established petitioner's guilt on Count I was required to convict him on Count III. Ever since *Carter* v. *McClaughry*, 183 U.S. 365, 394 (1901), the test of identity of offenses has been whether the same evidence is required to sustain them. See also *Morgan* v. *Devine*, 237 U.S. 632, 641 (1914), and *Gore* v. *United States*, 357 U.S. 386, 389 (1958).

Count I charges conspiracy to pass counterfeit $10.00 notes with defendant Paladinich actually passing a $10.00 note in Warren, Ohio. Count III charges the passing of a $10.00 note at the Warren Shopping Plaza in Ohio on January 3, 1963. The evidence discloses that this was accomplished by defendant Paladinich in Warren, Ohio (Tr. 23-24). The evidence supporting petitioner's participation as an aider and abettor on Count III is the identical evidence produced to support Count I—the conspiratorial agreement. This multiplication of offenses should not authorize multiple punishments.

(C) Initial criminal conduct is often not treated as a separate offense but is said to merge in the completed crime. *Prince* v. *United States*, 352 U.S. 322 (1957); *Heflin* v. *United States*, 358 U.S. 415 (1958). Conspiracies, presenting perplexing legal problems of fairness, however, are not considered merged in the completed crime. *Pereira* v. *United States*, 347 U.S. 1 (1953). The justice of this position deserves reexamination.

The Proposed Official Draft of the Model Penal Code of the American Law Institute adopted on May 4, 1962 recommends against conviction for more than one offense where "one offense consists only of a conspiracy or other form of preparation to commit the other" (Section 107b, p. 11).

Here, petitioner's conduct as alleged in Counts I through III was designed to culminate in the commission of the same crime—the passing of counterfeit notes. The fairness

of the multiple punishments imposed herein on these three counts should be reviewed.

Conclusion

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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INDICTMENT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CRIMINAL NO. 63-50

UNITED STATES OF AMERICA,

vs.

LENINE STROLLO, VINCENT SERMAN, ROBERT H. ARMSTRONG, JOHN PAUL PALADINICH, AND NICK ZAPPIA

Violation: Title 18, Section 371, 472 and 473, U.S.C.

* * * * * * *

The Grand Jury Charges:

From on or about November 1, 1962, to on or about February 11, 1963, in the Eastern Division of the Northern District of Ohio, Lenine Strollo, Vincent Serman, Robert H. Armstrong, and John Paul Paladinich knowingly, wilfully, unlawfully, with intent to defraud, did conspire together to defraud the United States of America and to violate Sections 472 and 473, Title 18, United States Code, by receiving, passing, selling, attempting to pass and attempting to sell obligations and securities of the United States made in the similitude of genuine $10.00 Federal Reserve notes with the intent to defraud and with the intent that said counterfeit notes be passed and used as true and genuine when, in fact, said persons knew said notes to be counterfeit.

As part of said conspiracy it was planned and intended that Lenine Strollo and Vincent Serman would receive counterfeit $10.00 Federal Reserve notes and would attempt to sell, transfer, deliver, exchange, pass and find others to buy, pass and attempt to pass said counterfeit $10.00 Federal Reserve notes.

As a further part of said conspiracy it was planned and intended that Robert H. Armstrong and John Paul Paladinich would receive, possess, pass and attempt to pass said counterfeit $10.00 Federal Reserves notes.

As a further part of said conspiracy it was planned and intended that Robert H. Armstrong and John Paul Paladinich would return the proceeds from receiving, possessing, passing and attempting to pass said counterfeit $10.00 Federal Reserve notes to Lenine Strollo and Vincent Serman, including money and property obtained from said activities and that thereafter Lenine Strollo, Vincent Serman, Robert J. Armstrong and John Paul Paladinich would divide said proceeds.

In furtherance of said conspiracy the following overt acts were committed:

1. On or about January 2, 1963, Vincent Serman, John Paul Paladinich and Lenine Strollo met at Lenine Strollo's home at 391 Jackson Street, Campbell, Ohio, and counted six thousand counterfeit $10.00 Federal Reserve notes.

2. On January 4, 1963, John Paul Paladinich passed counterfeit $10.00 Federal Reserve notes at Boardman, Ohio, Youngstown, Ohio, and Warren, Ohio.

3. On or about January 4, 1963, John Paul Paladinich, Vincent Serman and Joseph Paladinich, not herein indicted, met at the New York Central Railroad Depot at Youngstown, Ohio, and divided the proceeds of the passing activities of John Paul Paladinich and Joseph Paladinich in Boardman, Ohio, and Youngstown, Ohio.

4. On or about January 4, 1963, John Paladinich, Lenine Strollo and Vincent Serman met at Liberty Township, Trumbull County, Ohio, and divided the proceeds from the passing activities of John Paul Paladinich at Warren, Ohio.

5. On or about January 31, 1963, Vincent Serman, John Paul Paladinich and Robert J. Armstrong met at Lenny's Lounge at Poland, Ohio, where plans were made for passing and attempting to pass counterfeit $10.00 Federal Reserve notes in Columbus, Ohio, and where Robert J. Armstrong received from Vincent Serman five hundred counterfeit $10.00 Federal Reserve notes for said passing activities.

6. On or about February 1, 1963, John Paul Paladinich and Robert J. Armstrong passed counterfeit $10.00 Federal Reserves notes at Columbus, Ohio.

All in violation of Title 18, Section 371, United States Code.

COUNT II

And the Grand Jury further charges:

On or about January 2, 1963, in the Eastern Division of the Northern District of Ohio, Lenine Strollo, Vincent Serman and John Paul Paladinich did, with intent to defraud, have in their possession a counterfeit obligation of the United States of America purporting to be a $10.00 Federal Reserve note bearing Serial No. E 15285600 C, knowing said note to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT III

And the Grand Jury further charges:

On or about January 4, 1963, in the Eastern Division of the Northern District of Ohio, Vincent Serman, Lenine Strollo and John Paul Paladinich did, with intent to defraud, pass and attempt to pass a counterfeit $10.00 Federal Reserve note bearing Serial No. E 15285600 C at the Stambaugh-Thompson Store, Warren Shopping Plaza, Elm Road, Trumbull County, Ohio, knowing said note to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT IV

And the Grand Jury further charges:

On or about January 31, 1963, in the Eastern Division of the Northern District of Ohio, at and about Poland, Ohio, Lenine Strollo, John Paul Paladinich and Robert H. Armstrong did, with intent to defraud, have in their possession five hundred counterfeit obligations of the United States purporting to be $10.00 Federal Reserve notes, Serial No. C 67105007 E, knowing said notes to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT V

And the Grand Jury further charges:

On or about January 31, 1963, in the Eastern Division of the Northern District of Ohio, at Youngstown, Ohio, Lenine Strollo and Nick Zappia did, with intent to defraud, sell and attempt to sell counterfeit $10.00 Federal Reserve notes bearing Serial No. C 68185774 A to Special Agent Leonard A. Vecchione, of the United States Secret Service, knowing said notes to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT VI

And the Grand Jury further charges:

On or about February 1, 1963, in the Eastern Division of the Northern District of Ohio, at Youngstown, Ohio, Lenine Strollo and Nick Zappia did deliver to Special Agent Leonard A. Vecchione, of the United States Secret Service, a counterfeit $10.00 Federal Reserve note bearing Serial No. C 68185774 A, with intent that the same be passed and used as true and genuine, knowing said note to be counterfeit; in violation of Title 18, Section 473, United States Code.

A true bill.

——, ——,
Foreman.

——, ——,
United States Attorney.

MEMORANDUM OPINION ON MOTION FOR SEVERANCE AND FOR SEPARATE TRIALS

Criminal No. 63-50

* * * * * * *

KALBFLEISCH, J.

The indictment contains six counts. The first count charges that Lenine Strollo, Vincent Serman, Robert H. Armstrong, and John Paladinich conspired to receive, pass and sell counterfeit Federal Reserve notes. Count I further alleges that as part of this conspiracy it was planned that Lenine Strollo and Vincent Serman would find others to buy, pass and attempt to pass such counterfeit notes. Counts II, III and IV allege that various of the defendants named in the first count possessed and attempted to pass counterfeit notes. Counts V and VI charge that Lenine Strollo, who was named as a defendant in the conspiracy count, and Nick Zappia, who was not otherwise named in the indictment, attempted to pass and sell counterfeit notes. There is no allegation in Counts V and VI that these actions were taken in pursuance of the conspiracy charged in Count I.

Defendants Lenine Strollo and Vincent Serman have each moved for an order severing Counts V and VI from the remaining counts of the indictment and directing that Nick Zappia and Lenine Strollo, insofar as the latter is charged in Counts V and VI, be tried separately and apart from the trial of the other defendants. The basis for these motions is an alleged misjoinder of parties defendant and of offenses.

1. *Misjoinder of Offenses.*

The moving defendants have urged that there is a material difference between the charge of passing counterfeit notes and the charge of selling such notes. The Court holds that there is such a similarity between passing counterfeit notes and selling them that both activities, in appropriate cases such as this, can be classified as being of

the same or similar character, or as "being based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan". Rule 8(a), Federal Rules of Criminal Procedure; *Cataneo* v. *United States*, 167 F. 2d 820 (4th Cir., 1948).

It is clear that the indictment is concerned with no other matters than a conspiracy to dispose of counterfeit notes and various overt acts which were taken to dispose of such notes. Thus, all of the acts charged in the indictment "are of the same or similar character" (Rule 8(a), Federal Rules of Criminal Procedure) and the offenses were properly joined in one indictment.

2. *Misjoinder of Defendants.*

The moving defendants further contend that there was a misjoinder of defendants in the indictment. Rule 8(b), Federal Rules of Criminal Procedure, provides that:

> "Two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The moving defendants' claim of misjoinder is based on the contention that the indictment does not charge that Lenine Strollo and Nick Zappia, insofar as they are named in Counts V and VI, participated in the same transaction or series of transactions that are the subject of the remaining counts of the indictment. Furthermore, Nick Zappia is not named as a defendant in the conspiracy count, and therefore they contend that especially in regard to him there is no indication that the acts charged in Counts V and VI were connected with the acts charged in the other counts. In other words, they urge that there is nothing in the indictment to show that there is any connection between the first four counts and these last two counts. Therefore,

the moving defendants contend that the joinder of Strollo and Zappia under Counts V and VI with the other defendants under Counts I through IV is a violation of Rule 8(b), Federal Rules of Criminal Procedure, and that they are, as a matter of right, entitled to the relief sought. See *Ingram* v. *United States*, 272 F. 2d 567 (4th Cir., 1959); *Ward* v. *United States*, 289 F. 2d 877 (1961, D.C. Cir.); and *United States* v. *Harvick and Beattie*, 153 F. Supp. 696 (N.D. 1957).

The Court does not agree with these contentions because of three allegations which are contained in the indictment: (1) Count I charges Lenine Strollo with being a party to the conspiracy; (2) Count I charges that as part of the conspiracy it was planned that Lenine Strollo would attempt to find others to pass and attempt to pass counterfeit notes; and (3) the acts charged in Counts V and VI are alleged to have occurred on dates which are within the period of the conspiracy alleged in Count I.

A similar question was considered by the District Court for the District of Columbia in *United States* v. *Welsh*, 15 F.R.D. 189 (1953). In that case Judge Holtzoff held that when Count I of an indictment alleged a conspiracy in regard to operation of a numbers racket, and the remaining counts alleged various substantive acts in regard to the numbers racket, the fact that the date of each substantive act was alleged to have been within the time period of the conspiracy created a reasonable inference that the charges in the later counts were part of the same acts or transactions as was the conspiracy count. For this reason the Court there held that joinder of the defendants under Rule 8(b) was proper, and a motion for severance was denied.

This Court believes that the allegations that Strollo was a party to the conspiracy charged in Count I, that the conspiracy contemplated that Strollo would procure others to assist in passing the notes, and in Counts V and VI that Strollo and Zappia were passing and selling counterfeit notes, clearly assert actions which are part of the same series of acts or transactions. This is true in view of the fact that the passes and sales are charged to have occurred within the time period when the conspiracy was in exist-

ence. These allegations are therefore sufficient to charge the existence of one series of acts or transactions making joinder of the defendants permissible under Rule 8 (b), Federal Rules of Criminal Procedure. For other cases where joinder has been held proper, see *Kleven* v. *United States*, 240 F. 2d 270 (8th Cir., 1957); *Kivette* v. *United States*, 230 F. 2d 749 (5th Cir., 1956); and *Wiley* v. *United States*, 277 F. 2d 820 (4th Cir., 1960).

If at the trial the evidence fails to substantiate the relationship, which the Court believes the indictment indicates, between the acts charged in Counts V and VI and the remaining counts, then the defendants will be entitled to appropriate relief at that time.

3. *Relief under Rule 14.*

The Court will consider these motions as requests that it exercise its discretion, pursuant to Rule 14, Federal Rules of Criminal Procedure, to sever the indictment and order separate trials of defendants Strollo and Zappia on Counts V and VI in the basis that the joinder of offenses and defendants in one trial would prejudice any defendant. However, the Court has not been presented with sufficient evidence to warrant such relief. This is especially true in view of the fact that all of the acts alleged appear to have been part of one counterfeiting plan which can best be presented as one entire picture to one jury. The Court, in the exercise of its discretion, will at this time deny such requests.

/s/ GIRARD E. KALBFLEISCH,
United States District Judge.

ORDER

No. Cr. 63-50

* * * * * * *

KALBFLEISCH, J.:

Upon consideration,

IT IS ORDERED that the motions of Defendants Lenine Strollo and Vincent Serman for severance and for separate trials are hereby denied.

/s/ GIRARD E. KALBFLEISCH,
United States District Judge.

JUDGMENT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

* * * * * * *

CR 63-50

(Filed August 1, 1963)

On this 31st day of July, 1963 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty as to Counts I, II, III, and V of the Indictment of the offenses of having knowingly, wilfully, unlawfully with intent to defraud, conspired to defraud the United States of America, said conspiracy having been with other persons; having, with intent to defraud, had in his possession a counterfeit obligation of the United States of America; having, with intent to defraud, passed and attempted to pass a counterfeit Federal Reserve note, knowing said note to be counterfeit; having, with intent to defraud, sold and attempted to sell counterfeit Federal Reserve notes, knowing said notes to be counterfeit as charged in Counts I, II, III and V of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on each of Counts I, II, and III of the Indictment, said sentence to be served consecutively, total sentence: (9) years.

IT IS FURTHER ORDERED that the imposition of sentence on Count V of the Indictment is suspended, and pro-

bation is ordered for five (5) years, said probation to begin upon the completion of the service of the sentence imposed in Counts I, II, and III of the Indictment.

It Is Adjudged that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

It Is Ordered that the Cleark deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Girard E. Kalbfleisch,
United States District Judge.

JUDGMENT, UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

(Filed November 2, 1964)

Nos. 15,675; 15676; 15,702

Before EDWARDS, Circuit Judge, PRETTYMAN, Senior Circuit Judge, and BOYD, District Judge.

THIS CAUSE having come on to be heard upon the record, the briefs, and the arguments of counsel, and upon due consideration thereof, finding no error affecting substantial right of appellants,

IT IS ORDERED that the judgment of the District Court be, and it is, hereby affirmed.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

ORDER DENYING PETITIONS TO REHEAR AND MOTIONS TO REMAND

(Filed January 21, 1965)

Nos. 15675 and 15676

UNITED STATES COURT OF APPEALS

Before EDWARDS, Circuit Judge, PRETTYMAN, Senior Circuit Judge (by designation), and BOYD, District Judge (by designation).

Upon due consideration by the Court of Appellants' pending petitions to rehear and motions to remand and stay mandate of this Court and the response thereto by the Appellee herein,

IT IS ORDERED that said petitions to rehear and motions to remand and stay be and the same are hereby in all things denied.

By order of the Court.

/s/ CARL W. REUSS,
Clerk.

(4182-2)